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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in a civil case filed in the Circuit Court of the County of St. Louis. On May 28, 2002 this Court granted Respondents' Application for Transfer pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure. Accordingly, under Article V, §10 of the Missouri Constitution, jurisdiction lies in this Court.

STATEMENT OF FACTS

The Various Lawsuits

The present lawsuit, hereinafter referred to as "*Romeo v. Jones, et al.*" is but one of four different lawsuits referenced by the parties throughout this appeal. For purposes of aiding the Court, Romeos will refer to each of the lawsuits as follows: Romeos will refer to the lawsuit styled *R.J. DeRouin Homes, Inc. v. Darlene Romeo and Richard Romeo* (L.F. 187-190) as "*DeRouin Homes v. Romeo.*" Romeos will refer to the lawsuit styled *Richard Romeo and Darlene Romeo v. Dell Jones & Assoc., Inc.*, (L.F. 243-246) as "*Romeo v. Dell Jones.*" Romeos will refer to the lawsuit styled "*Richard Romeo and Darlene Romeo v. Ronald J. DeRouin and R.J. DeRouin Homes, Inc.*" as "*Romeo v. DeRouin.*"

The Home Purchase

Plaintiffs Richard Romeo and Darlene Romeo, husband and wife, purchased a new home in 1990 to be constructed by Dell Jones and Associates, Inc. in

Carriage Crossing Place Subdivision. L.F. 61-62. The Romeos observed many defects concerning the construction of their house prior to closing. L.F. 474-76. These defects included: poorly finished drywall where seams, tape and nails were highly visible; interior surfaces that were left unpainted; a basement door that only opened half way; the wrong size water heater; a dining room door that was improperly hung and damaged; and a telephone jack in the kitchen that was installed where it would be hit by the cabinet door. L.F. 474-76, 508, 617. A list of these defects was provided to a representative of the builder, Charlie, and one of the sales representatives, Sheila. L.F. 476. With the assurance that any problems would be taken care of, the Romeos closed on the purchase of their new home on September 6, 1990. L.F. 474, 481, 484, 509. After moving in, the Romeos were confronted with additional problems that included: splits/separation between the door frames and the drywall; splits/separation between the window frames and the drywall; damaged finish on the fireplace; stain that was sloppily applied to the stairway wood trim; a water leak in the upstairs master bathroom ceiling; a water leak above the dryer causing a split in the drywall and unsightly water marks; portions of the siding blew off the home four or five times; splintered door frames in the dining room and laundry room; water pipes that were installed in an un-insulated overhang froze on two occasions; window screens that were the wrong size allowing bugs to enter the home; countertops in the bathroom and kitchen that

pulled away from the wall; some trim was improperly installed; tile that was not sealed; a shower where two tiles and the towel bar popped off and the grout was insufficiently applied; all the downspouts were directed to the same corner of the house resulting in water coming into the home through the walkout basement; an exterior faucet that froze; a laundry room that was too small; a basement door frame that was not sealed and the doors leading from the home onto the deck that were never properly sealed; a kitchen floor that sagged; downstairs linoleum that was not properly laid; two of the windows were sprung; the basement wall had cracks and leaked; problems with the glides on the closet doors; the front left siding overhang was missing; the gas shut-off valve was faulty; areas under the windows and around the electrical outlets were not sealed; a floor joist was missing nails and a header; the finish on the exterior hardware rusted and the siding mildewed; and the upstairs bathroom drain did not function properly. L.F. 614-19.

Dell Jones and Associates, Inc., and their subcontractors, did address a limited number of the aforementioned problems. L.F. 614-19. However, many of their attempts provided unsatisfactory results. Id. The Romeos took on some of the repairs themselves and hired contractors for others. Id. The Romeos were left with many problems that were either not addressed by Dell Jones and Associates, Inc., or were provided a remedy that was unsatisfactory. Id.

In April of 1991, Mrs. Romeo sent a letter to Dell Jones and Associates, Inc. requesting that repairs be made to her home. L.F. 481. Ronald J. DeRouin responded to the April, 1991 letter the following August. Mr. DeRouin was an officer, director and shareholder of Dell Jones & Associates, Inc. L.F. 138-41. Mr. DeRouin was the person who met with the Romeos for "adjusting callbacks" for their new house on several occasions. L.F. 347. Mr. DeRouin was empowered by Dell Jones and Associates, Inc. to rectify or make whatever adjustments necessary for the Romeo's house. L.F. 347-48.

Mr. DeRouin met with Mrs. Romeo at her home and introduced himself as a representative of Dell Jones and Associates, Inc. L.F. 483. He had a copy of Mrs. Romeo's April, 1991 letter with him and reviewed with her the items she had listed. Id. Mrs. Romeo expressed her concern that the problems be recorded before the warranty expired but was told by Mr. DeRouin to forget about the warranty, that if it was Dell Jones and Associates, Inc.'s fault, Dell Jones and Associates, Inc. will fix it. Id. With regard to the problems with the laundry room, Mr. DeRouin asked Mrs. Romeo why she saved the worst for last. Id. Following Mrs. Romeo's meeting with Mr. DeRouin, Tony, a representative of Dell Jones and Associates, Inc., applied some topsoil around the house and inspected the problem screens. L.F. 485. Tony was of the opinion that the screens were the correct ones for the windows, in spite of the gaps large enough for bugs to enter the house. Id.

In January, 1992, Mrs. Romeo sent a certified letter to Mr. DeRouin wherein she noted that sporadic attempts had been made to correct some of the minor problems. L.F. 487. In the letter she listed the problems that she wanted addressed. Id. In March, 1992, having received no response to the January letter, Mrs. Romeo sent a second letter by certified mail. L.F. 488. This letter was returned as undeliverable. Id. In addition to her letter to Mr. DeRouin, the Romeos contacted the Better Business Bureau and the Office of the Attorney General. L.F. 489. Mrs. Romeo made many requests to the Better Business Bureau before receiving a response from Mr. DeRouin. Id.

In January, 1993, the Romeos sent a letter to Mr. DeRouin reiterating the problems with their house and noting that he had not contacted them as he had indicated he would in his reply to the Better Business Bureau. L.F. 72-75. Mr. DeRouin offered to address three of the problems: the sagging kitchen floor; the splintered door; and some cracks in the wall. L.F. 489. This was unacceptable to the Romeos because it only addressed some of the problems with their house. L.F. 490.

In February of 1993, the Romeos submitted a claim against their home owner's policy. L.F. 71, 492. The letter noted that inspection of the Romeo home revealed drywall and painting deficiencies throughout the home. L.F. 71. The insurance company denied coverage stating,

> "We do not insure for loss caused directly or indirectly by any of the following. . . . . defect, weakness, inadequacy, fault or unsoundness in: (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction. (3) materials used in repair, construction, renovation or remodeling; or (4) maintenance".

L.F. 71.

On March 8, 1993, the Romeos sent Mr. DeRouin a letter advising him of the findings of the insurance company claims adjuster. L.F. 76-77.

Subsequently, the Romeos obtained proposals and estimates to correct the problems with their home. L.F. 492. In April, 1993, J & S Painting Company proposed to remove the existing drywall, joint tape and related adhesives due to substandard workmanship and replace it throughout including paint and finish woodwork. L.F. 69. They also proposed removal and replacement of the improperly installed door and frame. Id. The total cost as proposed was $14,700.00. Id.

Larry A. Lapinski Painting's proposal dated June 17, 1993 included all materials and labor necessary for the repair of: the cracks on all metal corners throughout the house; nail pops and bad tape joints in ceilings throughput the house; sand texture applied to ceilings to match existing texture; painting of the

ceiling and walls. L.F. 70. Mr. Lapinski stated in his letter that the work is necessary because the original job was done incorrectly. Id. Total labor and materials to complete this work was quoted at $14,000.00. Id.

The MG Vennemann Company proposed removing the existing basement door and installing a new extension jam door frame and reusing the existing steel door to allow the door to swing freely at a cost to the Romeos of $550.00. L.F. 68. They proposed replacement of the damaged dining room door frame at a cost of $50.00. Repairs to the kitchen cabinet, bathroom countertop, and baseboard and trim were quoted at $200.00. Id.

The Romeos received a letter from the Better Business Bureau offering to submit the matter to arbitration. L.F. 491. The Romeos completed the necessary forms and returned them to the Better Business Bureau with their letter dated July 27, 1993. L.F. 78-79, 491. Mr. DeRouin declined to participate in arbitration. L.F. 491.

The Romeos sent letters to television Channels 2, 4 and 5 and to the St. Louis Post-Dispatch Newspaper for the purpose of making home "buyers beware" when purchasing a home, especially from Dell Jones and Associates, Inc., and to seek help and advice in obtaining compensation from the builder of their home. L.F. 241-42, 492. In response to a call from Jill Farmer, one of the news station's consumer advocates, Mr. DeRouin and a drywall contractor visited the Romeo

home. L.F. 492. During the meeting the drywall contractor told Mr. DeRouin that he was not using this type of drywall tape any more and that he was not having this problem any more. Id. Mr. DeRouin offered to have some spackling done on the drywall but his offer was unacceptable to the Romeos. L.F. 492-93.

In February, 1994, the Romeos sent Mr. DeRouin a letter offering to resolve the matter along with a packet of information they intended to distribute. L.F. 63-83. The packet included: a list of items that the Romeos considered to be "substandard features" of their home; copies of the proposals for repairs to their home; the letter from the insurance company denying coverage; copies of letters the Romeos had sent to Mr. DeRouin, the Better Business Bureau and the Office of the Attorney General. Id. Having received no response from Mr. DeRouin, Mrs. Romeo distributed packets at Crystal Creek subdivision on approximately six occasions (five of the occasions for approximately 1 ¼ hours; one time for about 10 minutes) during the months of February, March and April. L.F. 105. Mrs. Romeo distributed one packet of information to a sales agent at the Rockwood Forest display home and one packet to a motorist at a highway near the subdivision L.F. 479.

On April 25, 1994 Defendant Robert E. Jones sent a letter to the Romeos which contained the following statement: . . . "[Y]ou have been picketing another subdivision which is being developed by Mr. DeRouin and another corporation

unrelated to Dell Jones and Associates, Inc." L.F. 157. Upon receiving the April 25, 1994 letter Mrs. Romeo telephoned Defendant Robert E. Jones. L.F. 115-6, 632. Defendant Robert E. Jones told Mrs. Romeo that a subdivision she was picketing was being developed by Mr. DeRouin and another corporation unrelated to Dell Jones and Associates, Inc.. L.F. 115-16, 632. However, in the telephone conversation with Defendant Robert E. Jones, Jones refused to disclose the identity of the other corporation to Mrs. Romeo and in response to her inquiries, hung up on her. L.F. 240, 676.

Mrs. Romeo handed out several packets at Carriage Crossing Phase II on only one occasion in August of 1994. L.F. 504. Richard Romeo did not hand out any packets on any date. L.F. 641.

The Corporations

Mr. DeRouin owned various companies involved in construction and/or development at the subdivisions at which Mrs. Romeo distributed packets of information. L.F. 150. Defendants had represented Mr. DeRouin and his companies for many years**.** L.F. 600. Mr. DeRouin was an officer, shareholder and director of Dell Jones and Associates, Inc. and admittedly conducted the business and financial activities for Dell Jones and Associates, Inc. L.F. 138-41. Mr. DeRouin, on behalf of Dell Jones and Associates, Inc., was the individual

responsible for addressing construction complaints and problems with the Romeo house. L.F. 345.

Mr. DeRouin was the only officer, director and shareholder in R.J. DeRouin Homes, Inc. L.F. 185-186, 230-231. R.J. DeRouin Homes, Inc. developed Carriage Crossing Phase II and built homes in that subdivision. L.F. 150. Carriage Crossing Phase II subdivision was located approximately five houses from the Romeo house. L.F. 505. R.J. DeRouin Homes, Inc. proceeded to develop, construct and sell approximately 22 homes and lots in Carriage Crossing Phase II. L.F. 550-551.

The TRO

On or about August 23, 1994, R.J. DeRouin Homes, Inc. by and through the defendants, filed a petition styled *R. J. DeRouin Homes, Inc. v. Richard Romeo and Darlene Romeo* (hereinafter "*DeRouin Homes v. Romeo"*) seeking a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction. L.F. 187-90. In its petition, DeRouin Homes sought to have the Romeos enjoined from "making any public statements concerning DeRouin Homes' professional aptitude, and/or any public statements which tend to suggest that DeRouin Homes' is in any way responsible for any alleged defects in the Romeo's residence. L.F. 189. Defendants further prayed that the Romeos be ordered to "refrain from coming within one hundred feet of any real property owned or developed by"

DeRouin Homes. L.F. 189. At approximately 10:30 a.m. on August 23, 1994, Defendant Farkas telephoned and told the Romeos' teenage daughter that a hearing was scheduled at the Circuit Court at 2:30 p.m. that day. L.F. 641. In response to a panicked telephone call from his daughter, Mr. Romeo telephoned Defendant Farkas. Id. In response to Mr. Romeo's question "What is this all about?" Defendant Farkas told Mr. Romeo "This is to shut you and your wife up." Id. Mr. Romeo was able to reach his wife by telephone and Mrs. Romeo appeared at the courthouse. The trial court granted a Temporary Restraining Order as requested in DeRouin Homes' petition. L.F. 191-92, 679.

Plaintiffs filed a motion to dismiss the *DeRouin Homes v. Romeo* petition arguing that the lawsuit and the Temporary Restraining Order violated the Romeo's First Amendment rights under the United States Constitution as well as Article I, section 8 of the Missouri Constitution. L.F. 193-95. At the hearing on September 7, 1994 the court immediately dismissed the injunction action and the Temporary Restraining Order against the Romeos. L.F. 288. The court gave DeRouin Homes thirty days to file an amended petition. Id.

The Amended Petition

On September 14, 1994, Defendant Farkas sent a questionnaire to Mr. DeRouin to obtain information from him for use in a defamation suit to be filed against the Romeos. L.F. 290-94. No response to the questionnaire was received

by defendant Farkas before he filed suit for defamation. L.F. 290-94. On October 7, 1994, DeRouin Homes filed an amended petition against the Romeos alleging libel in Count I and slander in Count II. L.F. 197-202, 290-94. Defendant Farkas swore that the information contained in the amended petition for damages alleging libel and slander was "true and correct according to the best of [his] information, knowledge and belief." L.F. 197-202. In the amended petition Defendant Farkas alleged: [R.J. DeRouin Homes, Inc.] is not of any legal relation to Dell Jones and Associates, Inc.; R.J DeRouin Homes Inc. is a wholly separate and distinct legal entity from Dell Jones and Associates, Inc.; comprised of distinct ownership and management from Dell Jones and Associates, Inc." L.F. 197.

At the time the amended petition was filed, Mr. DeRouin was the only officer of each of Dell Jones and DeRouin Homes (L.F. 231, 239.); Mr. DeRouin was the only corporate director of each of Dell Jones and DeRouin Homes (Id.); Mr. DeRouin was a shareholder of both Dell Jones and DeRouin Homes (L.F. 346-47, 571), Dell Jones and DeRouin Homes had the same mailing address (L.F. 231, 239.); Dell Jones and DeRouin Homes had the same telephone number (L.F. 379.); Mr. DeRouin was the person responsible for customer satisfaction and quality control for both Dell Jones and DeRouin Homes (L.F. 462.); and Mr. DeRouin was the only contact person for both Dell Jones and DeRouin Homes who was contacted by Jones, et al. in providing legal services for each of these corporations

(L.F. 572.).

The defamation lawsuit initiated by R.J. DeRouin Homes, Inc. proceeded over the next eleven months during which time Mr. Romeo, Mrs. Romeo and Mr. DeRouin were deposed and written discovery was submitted by R.J. DeRouin Homes, Inc. to the Romeos. L.F. 337-510.

The depositions of Mr. DeRouin and the Romeos were taken on November 30, 1994. L.F. 337-471, 472-506, 507-10. In his deposition and in answers to interrogatories, Mr. DeRouin identified Mr. Hunt and Mr. Wood, his salesmen, as the only two persons who had heard the Romeos make any allegedly defamatory statements. L.F. 386-90, 538-39. Mr. DeRouin stated that he never told Defendant Farkas or Defendant Robert E. Jones that either Mr. Romeo or Mrs. Romeo made a statement about R.J. DeRouin Homes, Inc. that was false. L.F. 570. Mr. DeRouin stated that he never told Defendant Farkas or Defendant Robert E. Jones that either Mr. Romeo or Mrs. Romeo made a statement about R.J. DeRouin Homes, Inc. that was defamatory. L.F. 570. Mr. DeRouin stated that he never told Defendant Farkas or Defendant Robert E. Jones that either Mr. Romeo or Mrs. Romeo made a statement about R.J. DeRouin Homes, Inc. which held it up to public contempt, ridicule or scorn. L.F. 570.

On December 23, 1994, Defendant Farkas sent a letter to Mr. DeRouin in which he stated: "… an action for malicious prosecution simply does not lie until

the party bringing such action can demonstrate that the suit has been litigated to completion and that party has been successful." L.F. 295-96.

On February 23, 1995, Defendant Farkas sent a letter to Mr. DeRouin in which he stated: "The bulk of [our] discovery is directed at establishing a defense for you should the Romeos follow-up on their threats to file suit based on the alleged construction defects." L.F. 297.

On August 16, 1995, Defendant Farkas sent a letter to Mr. DeRouin in which he stated: "[The] Romeo's attorneys want to depose Hunt & Wood. This will involve 2-5 hours of my time. If your sales are complete you may want to think about dismissing and saving some money. Let me know." L.F. 298. On August 18, 1995, Defendant Farkas sent a letter to Mr. DeRouin in which he stated: "My strategy, in accordance with your directions, will be to attempt to delay the taking of the depositions, and then to dismiss the case prior to the scheduled date of the deposition. Please contact me immediately if anything set out in this letter causes you alarm or if the strategy which you wish to pursue in this matter changes in any way." L.F. 299.

On September 20, 1995, Defendant Farkas sent a letter to Mr. DeRouin in which he stated: "This case has been successful in quieting the defendants [Romeos]." L.F. 301.

On October 10, 1995, Defendant Farkas sent a letter to Mr. DeRouin in which he stated: "The Romeos had scheduled the depositions of Dick Wood and Tim Hunt for October 13, 1995. I was able to orchestrate a continuance of these depositions until Friday December 8, 1995. This will stand as our deadline to dismiss the lawsuit, assuming that is the strategy that you still intend to pursue. My hope is that you will be through with your present efforts to develop and sell so that there will be little to risk in dismissing the case." L.F. 303-04.

On November 17, 1995, a Memorandum of Dismissal was filed wherein DeRouin Homes dismissed its "cause of action, without prejudice, at the cost of [DeRouin Homes]." L.F. 203. Six days later, the Romeos filed their memorandum taxing as costs the depositions. L.F. 705-06. On December 1, 1995, the court "[o]n [its] own motion," "set aside and held for naught" the "taxing of deposition costs to [DeRouin Homes]." L.F. 707. On December 7, 1995, the Romeos filed their motion to tax as costs the depositions. L.F. 708-09. On December 14, 1995, the court called, heard and taxed costs in favor of the Romeos and against DeRouin Homes. L.F. 710. Thereafter, also on December 14, 1995, DeRouin Homes filed a motion to "set aside" the November 16, 1995 dismissal which the court granted. L.F. 711.

On January 26, 1996, the depositions of Wood and Hunt were taken. Wood and Hunt testified they never heard Mrs. Romeo make any statement. L.F. 312-15,

515. Wood and Hunt provided no information supporting DeRouin's claims for libel and slander. L.F. 324-25, 526-28. Wood testified that he never saw Darlene or Richard Romeo nor would he know what they looked like. L.F. 514. He also testified that no customers, potential or other, had told him that they had spoken with Darlene Romeo. L.F. 521.

Hunt testified that he saw Mrs. Romeo's "sign" only once, but could not recall what it said. L.F. 325. He testified that he knew of only one customer who did not purchase after speaking with Darlene Romeo, and that he didn't know if she was the reason for that person not buying. L.F. 318-20. But, in any event, he testified he did not tell Mr. DeRouin about this customer. Id. Finally, Hunt did not provide Mr. DeRouin with any information supporting the allegations in *DeRouin v. Romeo*. L.F. 324-25, 328.

On February 26, 1996, the lawsuit was voluntarily dismissed "with prejudice" and the court ordered "each party to pay its own costs over objection of [the Romeos]." L.F. 289. On February 26, 1996, the same day he dismissed the suit against the Romeos, Defendant Robert E. Jones sent a letter to Mr. DeRouin in which he stated: "I think that you will spend less money in the long run by defending the malicious prosecution suit, if one is filed, then if you tried a jury case in the pending libel suit and later defended a malicious prosecution action." L.F. 305. On March 12, 1996, the Romeos filed their Motion to Amend Judgment. L.F.

712-13. On March 14, 1996, Defendant Robert E. Jones filed a Motion to Set Aside Judgment. L.F. 714. On March 20, 1996 Defendant Robert E. Jones sent a letter to Mr. DeRouin in which he stated: "I think it is important to continue to insist that Romeo pay court costs. If we are successful in this regard, a malicious prosecution case goes away." L.F. 306. The court granted the Romeos' motion and ordered, R.J. DeRouin Homes, Inc., to pay costs. L.F. 715. The court also denied Defendant Robert E. Jones' motion to set aside the judgment. Id.

On April 4, 1996, Defendant Robert E. Jones sent a letter to Mr. DeRouin in which he stated: "As I indicated to you, I voluntarily dismissed the case only because the Judge indicated that he would order both parties to share the costs. I tried to reinstate the case, but the court was of the opinion that it had lost jurisdiction." L.F. 307.

Romeo v. R.J. DeRouin Homes Inc. and R.J. DeRouin

On September 6, 1996, the Romeos filed suit against Ronald J. DeRouin and R.J. DeRouin Homes, Inc. (i.e. *Romeo v. DeRouin*) alleging malicious prosecution and abuse of process based upon the prior actions filed against the them. L.F. 205-19. The Romeos settled their lawsuit against Ronald J. DeRouin and R.J. DeRouin Homes, Inc. and executed a release on July 16, 1998. L.F. 220-21. On July 21, 1998, the Court dismissed the Romeo's cause of action, without prejudice, for failure to prosecute. L.F. 222.

Romeo v. Jones, et al.

On August 20, 1999, the Romeos filed an action against defendant attorneys for abuse of process (i.e. *Romeo v. Jones, et al.*). L.F. 6-15. The petition was plead in four counts, Count I – Mr. Romeo's cause of action for abuse of process based on the August 23, 1994 injunction; Count II – Mrs. Romeo's cause of action for abuse of process based on the August 23, 1994 injunction; Count III – Mr. Romeo's cause of action for abuse of process based on the October 7, 1994 amended petition for libel and slander; and, Count IV – Mrs. Romeo's cause of action for abuse of process based on the October 7, 1994 amended petition for libel and slander. Id. The petition alleged that the civil action commenced in 1994 and the process used by defendants in initiating, prosecuting and continuing said action, constituted an illegal, improper, and perverted use of process neither warranted nor authorized by the process as determined by law. Id. The Romeos alleged in their petition that Defendants Robert E. Jones and Farkas acted thereby for an improper purpose, to wit: to allow R.J. DeRouin Homes, Inc. to build and sell houses without disclosure to the public of the standards of quality and workmanship deemed acceptable and appropriate by Mr. DeRouin; to allow Mr. DeRouin to build and sell houses, through and in connection with various corporate entities in which he exercised control over standards of quality and workmanship, without disclosure to the public of the standards of quality and workmanship

deemed acceptable and appropriate by Mr. DeRouin; to allow R.J. DeRouin Homes, Inc. to build and sell houses without disclosure to the public of the levels of purchaser satisfaction acceptable to Mr. DeRouin; to allow Mr. DeRouin to build and sell houses, through and in connection with various corporate entities in which he exercised control over levels of purchaser satisfaction, without disclosure to the public of the levels of purchaser satisfaction acceptable to Mr. DeRouin; to coerce and intimidate the Romeos into silence concerning distribution of information to the public concerning Mr. DeRouin and the construction of the Romeo's house; to coerce and intimidate Richard Romeo into pressuring and coercing his wife, Darlene Romeo, into silence and into ceasing distribution of information to the public concerning Mr. DeRouin and the construction of the Romeo's house; for the purpose of intimidating and harassing the Romeos; to cause economic loss to the Romeos; to cause sales of houses in which Mr. DeRouin, directly and/or through various corporate entities, had a financial interest, without public knowledge of his role and association with the home owned by the Romeos; to silence the Romeos concerning defects in the house built by Dell Jones and Associates, Inc., a corporation in which Mr. DeRouin had engaged in business; to use discovery to gather information for use by third parties; and/or, to prevent the Romeos from seeking redress for the wrongs committed by defendants by filing, prosecuting and continuing said lawsuit. Id.

Thereafter, defendants filed an Amended Motion for Summary Judgment alleging six basis for summary judgment. L.F. 22-36. The Honorable John F. Kintz granted defendants' amended motion for summary judgment without specifying the grounds upon which the motion was granted. L.F. 716. This appeal followed. L.F. 717-19.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DEFENDANTS' COLLATERAL PURPOSES FOR FILING AND PROSECUTING BOTH THE INJUNCTION AND THE AMENDED PETITION FOR LIBEL AND SLANDER: IN THAT:

A. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES V. ROMEO* LAWSUIT TO PROHIBIT THE ROMEOS FROM MAKING TRUTHFUL STATEMENTS CONCERNING THEIR HOUSE AND RONALD J. DEROUIN'S PROFESSIONAL APTITUDE AND BUILDING STANDARDS SO AS TO ALLOW RONALD J. DEROUIN TO SELL HOMES HE WAS BUILDING THROUGH HIS COMPANY, R.J. DEROUIN HOMES, INC.;

B. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES V. ROMEO* LAWSUIT TO CONDUCT DISCOVERY TO OBTAIN INFORMATION TO BE USED FOR DEFENDING DELL JONES AND ASSOCIATES, INC., ANOTHER COMPANY

CONTROLLED BY RONALD J. DEROUIN, IN THE EVENT A LAWSUIT WAS FILED AGAINST DELL JONES AND ASSOCIATES, INC.

Moffett v. Commerce Trust Co., 283 S.W.2d 591 (Mo. 1955)

National Motor Club of Missouri, Inc. v. Noe, 475 S.W.2d 16 (Mo. 1972)

Ritterbusch v. Holt, 789 S.W.2d 491 (Mo. 1990)

Stafford v. Muster, 582 S.W.2d 670 (Mo. 1979)

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

A. THE DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT (1) ANY CLAIMED DEFENSE OF SPLITTING A CAUSE OF ACTION IS WAIVED IF IT IS NOT PLED AND HERE THE DEFENDANTS HAVE NOT PLED THAT PLAINTIFFS SPLIT THEIR CAUSE OF ACTION AND ANY SUCH DEFENSE IS WAIVED; (2) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT PROHIBIT PLAINTIFFS FROM SUING JOINT TORTFEASORS

INDIVIDUALLY AND HERE THE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE WITH RONALD J. DEROUIN AND R.J. DEROUIN HOMES INC. FOR THE DAMAGES CLAIMED BY PLAINTIFFS; AND (3) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION PROHIBITS A SUBSEQUENT ACTION AGAINST THE SAME DEFENDANT BUT HERE, THE DEFENDANTS ARE NOT THE SAME DEFENDANTS AS THOSE IN *ROMEO V. DEROUIN*.

B. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT:

(1) RES JUDICATA BARS AN ACTION PREVIOUSLY ADJUDICATED ON THE MERITS AND HERE THERE HAD PREVIOUSLY BEEN NO ADJUDICATION ON THE MERITS OF PLAINTIFFS' CLAIMS SET FORTH IN THE *ROMEO V. JONES, ET AL.* PETITION, AND

(2) RES JUDICATA BARS AN ACTION WHERE THAT ACTION INVOLVES THE SAME THING SUED FOR, THE SAME CAUSE OF ACTION, THE SAME PARTIES AND

THE SAME QUALITIES OF PERSONS BUT HERE THE PARTIES IN *ROMEO V. JONES, ET AL.* ARE NOT THE SAME PARTIES OR IN PRIVITY THERETO WITH THOSE IN *ROMEO V. DEROUIN*; THE THING SUED FOR DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*; AND THE CAUSE OF ACTION DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*.

C. PLAINTIFFS' FACTS AND PLEADINGS SUPPORT A CAUSE OF ACTION FOR ABUSE OF PROCESS, IN THAT PLAINTIFFS ARE NOT PRECLUDED FROM PURSUING THEIR CLAIMS FOR ABUSE OF PROCESS BECAUSE THERE ARE FACTS WHICH ALSO SUPPORT A CAUSE OF ACTION FOR MALICIOUS PROSECUTION.

Arana v. Koerner, 735 S.W.2d 729 (Mo. App. 1987)

Evans v. St. Louis Comprehensive Neighborhood Health Center, 895 S.W.2d 124 (Mo. App. E.D. 1995)

Lay v. Lay, 912 S.W.2d 466 (Mo. banc 1995)

Shores v. Express Lending Services, Inc., 998 S.W.2d 122 (Mo. App. E.D. 1999)

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE DEFENDANTS, AS ATTORNEYS FOR R.J. DEROUIN HOMES, INC. IN *DEROUIN HOMES V. ROMEO*, THE UNDERLYING ACTION, ARE LIABLE FOR ABUSE OF PROCESS IN THAT, AN ATTORNEY MAY BE LIABLE TO A THIRD PERSON FOR ACTS ARISING OUT OF ATTORNEY'S REPRESENTATION OF A CLIENT IF THE ATTORNEY IS GUILTY OF A MALICIOUS OR TORTIOUS ACT AND HERE THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE ACTS OF THE DEFENDANTS WERE (1) INTENTIONAL TORTIOUS ACTS; (2) MALICIOUS ACTS; AND (3) ACTS COMMITTED IN COLLUSION WITH THEIR CLIENTS FOR WHICH DEFENDANTS ARE LIABLE FOR ABUSE OF PROCESS.

Fischer ex rel. Scarborough v. Fischer, 34 S.W.3d 263 (Mo.App. W.D. 2000)

Jordan v. Kansas City, 929 S.W.2d 882 (Mo.App. 1996)

Valley Farm Dairy Co. v. Horstmeier, 420 S.W.2d 314 (Mo. 1967)

Stafford v. Muster, 582 S.W.2d 670 (Mo. 1979)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DEFENDANTS' COLLATERAL PURPOSES FOR FILING AND PROSECUTING BOTH THE INJUNCTION AND THE AMENDED PETITION FOR LIBEL AND SLANDER IN THAT:

A. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES V. ROMEO* LAWSUIT TO PROHIBIT THE ROMEOS FROM MAKING TRUTHFUL STATEMENTS CONCERNING THEIR HOUSE AND RONALD J. DEROUIN'S PROFESSIONAL APTITUDE AND BUILDING STANDARDS SO AS TO ALLOW RONALD J. DEROUIN TO SELL HOMES HE WAS BUILDING THROUGH HIS COMPANY, R.J. DEROUIN HOMES, INC.;

B. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES V. ROMEO* LAWSUIT TO CONDUCT DISCOVERY TO OBTAIN INFORMATION TO BE USED FOR DEFENDING DELL JONES AND ASSOCIATES, INC., ANOTHER COMPANY

CONTROLLED BY RONALD J. DEROUIN, IN THE EVENT A LAWSUIT WAS FILED AGAINST DELL JONES AND ASSOCIATES, INC.

On appeal of a summary judgment, this Court reviews the record in the light most favorable to the party against whom judgment was entered. Thomas Berkeley Consulting Engineer, Inc. v. Zerman, 911 S.W.2d 692, 695 (Mo.App. E.D. 1995). The standard of review on this point is de novo. Id.

A. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES V. ROMEO* LAWSUIT TO PROHIBIT THE ROMEOS FROM MAKING TRUTHFUL STATEMENTS CONCERNING THEIR HOUSE AND RONALD J. DEROUIN'S PROFESSIONAL APTITUDE AND BUILDING STANDARDS SO AS TO ALLOW RONALD J. DEROUIN TO SELL HOMES HE WAS BUILDING THROUGH HIS COMPANY, R.J. DEROUIN HOMES, INC.

Three elements must be established for a plaintiff to prevail on a claim for abuse of process: 1) the present defendant made an illegal, improper, perverted use of process; 2) the present defendant had an improper purpose in exercising such an illegal, perverted or improper use of process; and, 3) damage resulted. National

Motor Club of Missouri, Inc. v. Noe, 475 S.W.2d 16, 24 (Mo. 1972). As defined by this Court, the tort of abuse of process is

> * * *the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish*. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings which were brought with probable cause and for a proper purpose or even that the proceedings terminated in favor of the person instituting or initiating them. *The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in the section*.

Moffett v. Commerce Trust Co., 283 S.W.2d 591, 599 (Mo. 1955) (Emphasis ours.)

The phrase "use of process" refers to some willful, definite act not authorized by the process or aimed at an objective not legitimate in the proper employment of such process. Stafford v. Muster, 582 S.W.2d 670, 678 (Mo. 1979). In Stafford, this Court held that a judge presiding over the issuance of a writ of habeas corpus and the attorney involved in the issuance of the writ could be held liable for abuse of process if the elements were established. This Court further held

that the petition alleged the attorneys/defendants used the writ to interrogate Stafford as to matters that were beyond the scope of proper inquiry under Rule 91.16. Id. at 679. Questions concerning the address of Stafford's parent's and Stafford's former telephone number were beyond the scope of proper inquiry. Id.

In order to prevail, a plaintiff need neither show some benefit accrued to the guilty party, nor need plaintiff show some collateral disadvantage himself. Ritterbusch v. Holt, 789 S.W.2d 491 (Mo. 1990) overruling Zahorsky v. Barr, Glynn and Morris, P.C., 693 S.W.2d 839 (Mo.App.W.D. 1985). In Ritterbusch, the plaintiff, averred that Holt had caused Ritterbusch to be arrested for the purpose of coercing Ritterbusch to pay for damages to Holt's vehicle. Id. at 492. Ritterbusch refused to pay Holt and was later found not guilty of the charges in the underlying suit. Id. This Court held that Ritterbusch's allegations met the requirements of Stafford. Id. at 493.

In their Amended Motion for Summary Judgment, Defendants argue that, even if the *DeRouin Homes v. Romeo* action was "unfounded", that is insufficient to sustain a finding that the Defendants abused process. L.F. 32. To support their position, Defendants cited language found in Wells v. Orthwein, 670 S.W.2d 529 (Mo.App. E.D. 1984). The Defendants argue, incorrectly, that no liability attaches where all they sought was the relief set forth in their petition. That is not what Wells stands for, nor is that the law in this State.

Wells states that "no liability is incurred where the defendant has done nothing more than pursue the lawsuit to its authorized conclusion . . . ." Wells at 533. Wells also states that "[However,] [i]f an action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint there is no abuse . . . **[i]f the suit is brought for a collateral purpose, there is abuse of process."** Wells at 532. (emphasis added). Here, there is ample evidence establishing that the *DeRouin Homes v. Romeo* action was not "confined to its regular and legitimate function." Had it been, all that the present Defendants would have been seeking would have been to bar the Romeos from making false statements concerning R.J. DeRouin Homes, Inc. and to seek compensation for damages as a result of false and defamatory statements.

In their Amended Motion for Summary Judgment, defendants claim there was no abuse of process because there was no evidence of a "collateral purpose". But the indisputable evidence creates a question of fact concerning the defendants' goal: the purpose for bringing the action against the Romeos was (1) to silence the Romeos from making truthful statements until Mr. DeRouin had sold his houses, and (2) to get information from the Romeos should they file an action against one of DeRouin's other corporations. Plaintiffs' petition clearly sets forth the ultimate facts supporting their claims that the Defendants Robert E. Jones and Farkas abused process. L.F. 8-9, 11-14. The petition need only state the ultimate facts

and not the facts or circumstances by which plaintiff will establish the ultimate facts. Heitman v. Brown Group, Inc., 638 S.W.2d 316, 320 (Mo.App. E.D. 1982).

The Romeos gave Dell Jones and Associates, Inc. a list of problems with their house. L.F. 476. The Romeos were told at the walk-through that they should write any problems down. L.F. 481. For more than two years after closing, Mrs. Romeo contacted, both verbally and in writing, agents of Dell Jones and Associates, Inc. including Ronald DeRouin. L.F. 481, 483. Due to Dell Jones and Associates, Inc.'s lack of response, the Romeos contacted the Better Business Bureau and the Office of the Attorney General of Missouri in early 1993. L.F. 63-82. Also in 1993 the Romeo's insurer denied coverage for the repairs to the drywall and painting deficiencies due to poor construction or substandard workmanship. L.F. 63-82, 492. The Romeos obtained estimates for the necessary repairs, which totaled approximately $15,000.00. L.F. 63-82, 501. Mrs. Romeo contacted some of the local news media to see if they might be able to help. L.F. 492. When all prior efforts had failed, Mrs. Romeo prepared a "packet" of information and sent it to Mr. DeRouin on February 5, 1994. L.F. 63-82, 496-97. Nowhere in the packet is there any reference to R.J. DeRouin Homes, Inc. L.F. 63-82

On April 25, 1994 Defendant Robert E. Jones sent a letter to the Romeos threatening to file suit if they continued to disseminate materials related to Dell

Jones and Associates, Inc. L.F. 157. Upon receipt of the letter, Mrs. Romeo telephoned Robert E. Jones who reiterated his threat to file suit and hung up on her. L.F. 632. On August 14, 1994, Mrs. Romeo handed out approximately seven (7) packets at Carriage Crossing II subdivision, which was located down the street from the Romeo's residence. L.F. 184. On August 23, 1994 Defendant Robert E. Jones filed suit seeking a temporary restraining order to enjoin the Romeos from making any statements regarding R.J. DeRouin Homes, Inc.'s professional aptitude and to restrict them from coming within 100 feet of property owned by or developed by R.J. DeRouin Homes, Inc. L.F. 187-190. At approximately 10:30 a.m. on August 23, 1994, Defendant Farkas telephoned and told the Romeos' teenage daughter that a hearing was scheduled at the Circuit Court at 2:30 p.m. L.F. 641. In response to a telephone call from his daughter, Mr. Romeo telephoned Defendant Farkas. Id. In response to Mr. Romeo's question "What is this all about?" Defendant Farkas told Mr. Romeo "This is to shut you and your wife up." Id. Mrs. Romeo attended the hearing where a TRO was issued. L.F. 679. On September 7, the Romeos filed a motion to dismiss the injunction suit which was immediately granted by the court, R.J. DeRouin Homes, Inc. being granted thirty (30) days to amend its pleadings. L.F. 288.

Defendant Farkas contacted Mr. DeRouin stating that the TRO has been set aside and requested that Mr. DeRouin gather information for a slander petition.

L.F. 290-94. On September 14, 1994, Defendant Farkas faxed Mr. DeRouin a letter and questionnaire outlining the information that would be necessary to proceed with a defamation action. Id. Although the information was not provided, on October 7, 1994 Defendant Farkas filed amended pleadings for libel and slander, in which Defendant Farkas swore to the accuracy of the statements contained therein. L.F. 197-202. Among the statements to which Defendant Farkas swore to its accuracy was the statement that "[R.J. DeRouin Homes, Inc.] is not of any legal relation to Dell Jones and Associates, Inc.; R.J. DeRouin Homes, Inc. is a wholly separate and distinct legal entity from Dell Jones and Associates, Inc; **comprised of distinct ownership and management** from Dell Jones and Associates, Inc." Id. At the time, Mr. DeRouin was the only officer of DeRouin Homes and Dell Jones; Mr. DeRouin was the only corporate director of DeRouin Homes and Dell Jones; Mr. DeRouin was a shareholder of DeRouin Homes and Dell Jones (L.F. 185-86, 231, 239.); DeRouin Homes and Dell Jones had the same mailing address (L.F. 231, 239.); DeRouin Homes and Dell Jones had the same telephone number (L.F. 379.); Mr. DeRouin was the person responsible for customer satisfaction and quality control for both DeRouin Homes and Dell Jones; and Mr. DeRouin was the only contact person for DeRouin Homes and Dell Jones who for years was contacted by the Defendants in providing legal services for each of these corporations. L.F. 462, 557, 572.

In a letter to Mr. DeRouin dated December 23, 1994, Defendant Farkas informed Mr. DeRouin that he anticipates a lawsuit for malicious prosecution against Mr. DeRouin if they proceed with the lawsuit against the Romeos but advises his client that the Romeos can't initiate a lawsuit until the prior suit is concluded in that party's favor. L.F. 295-96. Two months later Defendant Farkas, in a letter to Mr. DeRouin, when discussing the "great deal of discovery directed at [the Romeos]" stated "I don't find anything in particular of concern in the discovery answers. *The bulk of [our] discovery is directed at establishing a defense for you should the Romeos follow-up on their threats to file suit based on the alleged construction defects.*" L.F. 297. (emphasis ours.) Such a suit would have been against Dell Jones and Associates, Inc. – not R.J. DeRouin Homes, Inc.

In his answers to interrogatories and in his deposition testimony Mr. DeRouin identified Tim Hunt and Dick Wood (his real estate salesmen) as the two individuals who had testimony concerning the claims of libel and slander against the Romeos. In August, 1995, the Romeos sought to take the depositions of Hunt and Wood. Defendant Farkas faxed Mr. DeRouin a note on August 16, 1995 stating: "Romeos [sic] attorneys want to depose Hunt & Wood. This will involve 2-5 hours of my time. If your sales are complete you may want to think about dismissing and saving some money. Let me know." L.F. 298. Two days later

Defendant Farkas confirmed his discussions with Mr. DeRouin regarding Mr. DeRouin's desire to dismiss the lawsuit in a letter wherein he states:

> [m]y strategy, in accordance with your directions, will be to attempt to delay the taking of the depositions, and then to dismiss the case prior to the scheduled date of the deposition. Please contact me immediately if anything set out in this letter causes you alarm or if the strategy which you wish to pursue in this matter changes in any way.

L.F. 299.

On September 20, 1995, in Defendant Farkas' letter to Mr. DeRouin he stated "[t]his case has been successful in quieting the Romeos…" L.F. 300-02.

On October 10, 1995, Defendant Farkas wrote to Mr. DeRouin:

> The Romeos had scheduled the depositions of Dick Wood and Tim Hunt for October 13, 1995. I was able to orchestrate a continuance of these depositions until Friday December 8, 1995. This will stand as our deadline to dismiss the lawsuit, assuming that is the strategy that you still intend to pursue. My hope is that you will be through with your present efforts to develop and sell so that there will be little to risk in dismissing the case.

L.F. 303-04.

On November 16, 1995, Defendant Robert E. Jones sent Mr. DeRouin a copy of the Memorandum of Dismissal dismissing the cause without prejudice. L.F. 595.

On December 14, 1995 the Jones, et al. filed a motion to set aside the dismissal. L.F. 712, 713. Then on February 26, 1996 Defendant Robert E. Jones wrote to Mr. DeRouin that he dismissed the case with prejudice on the belief the judge would order the Romeos to pay their own costs and advised that "I think that you will spend less money in the long run by defending the malicious prosecution suit, if one is filed, then [sic] if you tried a jury case in the pending libel suit and later defended a malicious prosecution action." L.F. 305. On March 14, 1996, Defendant Robert E. Jones filed a motion to have the *DeRouin v. Romeo* Judgment set aside. L.F. 596. Defendant Robert E. Jones wrote to Mr. DeRouin "I think it is important to continue to insist that Romeo pay court costs. If we are successful in this regard, a malicious prosecution case goes away." L.F. 306. On April 4, 1996, Defendant Robert E. Jones wrote to Mr. DeRouin "[a]s I indicated to you, I voluntarily dismissed the case only because the Judge indicated that he would order both parties to share the costs. L.F. 307.

Defendants did not seek a TRO and permanent injunction to enjoin the Romeos from making ***false*** statements concerning DeRouin Homes – Defendants

sought a TRO and injunction to enjoin the Romeos from making ***any*** statements concerning DeRouin Homes's professional aptitude. The Romeos were precluded from making ***any truthful statement*** about the professional aptitude of Ronald J. DeRouin – a person who was an officer, director and shareholder of Dell Jones and Associates, Inc., the entity that had built the Romeo house; the person who was admittedly responsible for making quality control decisions concerning the Romeo house; the person who determined what repairs would be made to the Romeo house; the person who was in charge of customer satisfaction for the Romeo house; the person who dealt with the Better Business Bureau and the Missouri Attorney General's Office concerning the Romeo house. This same Ronald J. DeRouin was the same person who was admittedly the sole shareholder, sole officer and sole director of DeRouin Homes; the person who was admittedly responsible for making the quality control decisions concerning homes built by DeRouin Homes; the person who determined what repairs would be made to houses built by DeRouin Homes; the person who was in charge of customer satisfaction for purchasers of houses built by DeRouin Homes. ***Any*** statement the Romeos would make concerning Ronald J. DeRouin's professional aptitude would "concern" the professional aptitude of DeRouin Homes – an activity that Defendants had enjoined the Romeos from pursuing.

The Petition for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction alleged that the Romeos made false and damaging statements about DeRouin Homes and picketed properties owned by DeRouin Homes with statements that DeRouin Homes was responsible for the defective house the Romeos had purchased from Dell Jones. L.F. 187-190. DeRouin Homes was the only plaintiff. Id. Neither Dell Jones nor Ronald J. DeRouin were plaintiffs in this action. Id.

The Amended Petition For Damages alleged that the Romeos made public statements and handed out materials which were false and defamatory to DeRouin Homes. L.F. 199. DeRouin Homes sought damages against the Romeos for slander in an amount in excess of $25,000 and damages against the Romeos for libel in an amount in excess of $25,000. L.F. 200. DeRouin Homes was the only plaintiff. L.F. 197-200. Neither Dell Jones nor Ronald J. DeRouin were plaintiffs in this action. Id.

Jones, et al.'s true purpose in filing and prosecuting the injunction and defamation actions was to keep Darlene Romeo and Richard Romeo quiet while Ronald J. DeRouin, acting through DeRouin Homes, completed the sale of its homes. Defendant Farkas told Mr. Romeo that the purpose of the hearing was to shut the Romeos up. L.F. 641. When the injunction was dismissed the pleadings were amended and a petition for libel and slander against the Romeos containing

false allegations of fact was sworn to and filed by Defendant Farkas in the Circuit Court for the County of St. Louis seeking damages in excess of $25,000 on each count from both Romeos. L.F. 197-202. Mr. DeRouin admitted that he never informed Jones, et al. that the Romeos made any false statements about DeRouin Homes; he admitted that he never informed Jones, et al. that the Romeos made any defamatory statement about DeRouin Homes – yet Jones, et al. filed actions against the Romeos for libel and slander. L.F. 570.

Whether Jones, et al.'s use of process was to accomplish an unlawful end or compel Romeos to do something which they could not be compelled to do legally is a question of fact for the jury.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DEFENDANTS' COLLATERAL PURPOSES FOR FILING AND PROSECUTING BOTH THE INJUNCTION AND THE AMENDED PETITION FOR LIBEL AND SLANDER IN THAT:

B. THERE ARE FACTS TO SUPPORT A FINDING THAT THE DEFENDANTS WRONGFULLY UTILIZED THE *DEROUIN HOMES V. ROMEO* LAWSUIT TO CONDUCT DISCOVERY TO

OBTAIN INFORMATION TO BE USED FOR DEFENDING DELL JONES AND ASSOCIATES, INC., ANOTHER COMPANY CONTROLLED BY RONALD J. DEROUIN, IN THE EVENT A LAWSUIT WAS FILED AGAINST DELL JONES AND ASSOCIATES, INC.

Jones et al.'s use of discovery in the underlying action was not proper. Missouri Supreme Court Rule 56.01(b)(1) provides: "In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery…." Even if the discovery sought by Defendant Farkas may have been proper on its face, it is an **admitted** fact that the information was being sought for another purpose – one constituting an abuse of process. In Defendant Farkas' letter to Mr. DeRouin dated February 23, 1995, Defendant Farkas states "[t]he bulk of discovery is directed at establishing a defense for you should the Romeos follow up on their threats to file suit based on the alleged construction defects." L.F. 297. Defendant Farkas clearly abused the process in his use of discovery to gain information to prepare the defense of an action against another corporation which had not yet been filed.

Plaintiffs have demonstrated sufficient evidence from which a prima facie case of abuse of process may be found. Clearly Plaintiffs present evidence from which the jury may find Jones, et al. abused process. Clearly Jones, et al.'s Amended Motion for Summary Judgment should be denied.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

A. THE DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT (1) ANY CLAIMED DEFENSE OF SPLITTING A CAUSE OF ACTION IS WAIVED IF IT IS NOT PLED AND HERE THE DEFENDANTS HAVE NOT PLED THAT PLAINTIFFS SPLIT THEIR CAUSE OF ACTION AND ANY SUCH DEFENSE IS WAIVED; (2) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT PROHIBIT PLAINTIFFS FROM SUING JOINT TORTFEASORS INDIVIDUALLY AND HERE THE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE WITH RONALD J. DEROUIN AND R.J. DEROUIN HOMES INC. FOR THE DAMAGES CLAIMED BY PLAINTIFFS; AND (3) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION PROHIBITS A SUBSEQUENT ACTION

AGAINST THE SAME DEFENDANT BUT HERE, THE DEFENDANTS ARE NOT THE SAME DEFENDANTS AS THOSE IN *ROMEO V. DEROUIN*.

B. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT:

(1) RES JUDICATA BARS AN ACTION PREVIOUSLY ADJUDICATED ON THE MERITS AND HERE THERE HAD PREVIOUSLY BEEN NO ADJUDICATION ON THE MERITS OF PLAINTIFFS' CLAIMS SET FORTH IN THE *ROMEO V. JONES, ET AL.* PETITION, AND

(2) RES JUDICATA BARS AN ACTION WHERE THAT ACTION INVOLVES THE SAME THING SUED FOR, THE SAME CAUSE OF ACTION, THE SAME PARTIES AND THE SAME QUALITIES OF PERSONS BUT HERE THE PARTIES IN *ROMEO V. JONES, ET AL.* ARE NOT THE SAME PARTIES OR IN PRIVITY THERETO WITH THOSE IN *ROMEO V. DEROUIN*; THE THING SUED FOR DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND

ROMEO V. DEROUIN; AND THE CAUSE OF ACTION DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*

C. PLAINTIFFS' FACTS AND PLEADINGS SUPPORT A CAUSE OF ACTION FOR ABUSE OF PROCESS, IN THAT PLAINTIFFS ARE NOT PRECLUDED FROM PURSUING THEIR CLAIMS FOR ABUSE OF PROCESS BECAUSE THERE ARE FACTS WHICH ALSO SUPPORT A CAUSE OF ACTION FOR MALICIOUS PROSECUTION.

On appeal of a summary judgment, this Court reviews the record in the light most favorable to the party against whom judgment was entered. Thomas Berkeley Consulting Engineer, Inc. v. Zerman, 911 S.W.2d 692 (Mo.App. E.D. 1995). The standard of review on this point is de novo. Id.

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DOCTRINE OF SPLITTING A CAUSE OF ACTION DOES NOT PROHIBIT PLAINTIFFS FROM SUING JOINT TORTFEASORS INDIVIDUALLY AND HERE THE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE WITH RONALD J. DEROUIN AND R.J. DEROUIN HOMES INC. FOR THE DAMAGES CLAIMED BY PLAINTIFFS; AND (3) THE DOCTRINE OF SPLITTING A CAUSE OF ACTION PROHIBITS A SUBSEQUENT ACTION AGAINST THE SAME DEFENDANT BUT HERE, THE DEFENDANTS ARE NOT THE SAME DEFENDANTS AS THOSE IN *ROMEO V. DEROUIN*.

(1) Defendants Waived The Defense Of Splitting A Cause Of Action.

In their Amended Motion for Summary Judgment, Defendants for the first time proposed that summary judgment was proper because the Romeos had split their cause of action. L.F. 29-30. In general, the test for determining whether a cause of action is single and cannot be split is: 1) whether separate actions brought arise out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions.

Lay v. Lay, 912 S.W.2d 466,472 (Mo. banc 1995). There are numerous deficiencies with Defendants' position.

First, Defendants clearly waived any arguable defense of "splitting a cause of action." "The rule against splitting a cause of action . . . is for the benefit of the defendant and may be waived." Evans v. St. Louis Comprehensive Neighborhood Health Center, 895 S.W.2d 124, 125 (Mo. App. E.D. 1995) citing National Garment Co. v. New York, C. & St. L.R. Co., 173 F.2d 32 (8 Cir. 1949) [1-5]; Coleman v. Kansas City, Mo., 351 Mo. 254, 173 S.W.2d 572 (1943) [5,6]. "When an attempt is made to split a claim, ***defendant must raise the defense at the earliest possible time, otherwise it waives the defense.***" Id. (emphasis ours.) Romeos filed their petition on August 20, 1999. L.F. 6-15. Defendants filed and served their Answer on October 18, 1999. L.F. 16-21. Therein, Defendants setout four affirmative defenses. Id. However, they chose not to raise the defense of "splitting a cause of action." In fact, Defendants have **never** filed an answer raising "splitting a cause of action". Even when the Defendants moved to amend their answer on December 8, 2000, the only amendment was to include the defense of "set off." L.F. 3-4. The first time Defendants even mention the phrase "splitting a cause of action," is in their improperly-filed Response To Plaintiffs' Memorandum In Opposition To Defendants' Motion For Summary Judgment, filed on November 22, 2000, more than thirteen months after they filed their original answer. L.F. 3. That "original"

Motion for Summary Judgment was subsequently voluntarily withdrawn by Defendants. L.F. 4. Not only have Defendants here failed to "raise the defense at the earliest possible time," they have failed to raise it at all. As such, the defense is waived.

(2) Plaintiffs May Sue Joint Tortfeasors Individually Or All In One Action And In The Present Action Defendants Are Jointly And Severally Liable With The Defendants From The Underlying Action.

Even had Defendants raised and preserved this defense, it has no application here. Defendants overlooked the basic principle applicable to joint tortfeasors: "A plaintiff suffering an injury caused by joint tortfeasors may sue each tortfeasor individually or may sue all the tortfeasors in one action." Arana v. Koerner, 735 S.W.2d 729, 734 (Mo. App. 1987). Clearly, "each tortfeasor may be sued severally." Id. citing Prosser & Keeton On Torts §47 (5th ed. 1984). Splitting a cause of action does not apply to jointly and severally liable defendants. Id.

In Arana, a doctor had been a defendant in a medical malpractice action. His insurance company retained counsel to represent him. He forbade his attorneys and insurer from settling the claim as he believed it to be without merit. His instructions were not followed. Thereafter, the doctor filed two separate actions: one against the insurer-paid attorneys and one against the insurer. In both actions, the doctor's "allegations as to the items and amount of damages were the same." Arana, at 732. Doctor thereafter settled with the insurer and proceeded with his action against the attorneys. The attorneys argued that the doctor had improperly

split his cause of action. Specifically, they argued that the insurer should have been made a party to the action against the attorneys and that the doctor "split his cause of action so that he could have two chances at recovery." Id. at 734. The court held that since the damages were the same, the defendants were jointly and severally liable. Accordingly, the doctor properly sued them separately and he did not improperly split his cause of action. Id.

The same rule applies to contract actions, as well. In Irwin v. Bertelsmeyer, 730 S.W.2d 302 (Mo. App. E.D. 1987), plaintiff originally filed and successfully prosecuted an action for breach of contract against Imperial Auto Auction, Robert Bertelsmeyer and Earl Morton. Thereafter, as plaintiff apparently did not receive full satisfaction of the judgment, plaintiff prosecuted another action for breach of the same contract. However, the defendant this time was Robert Bertelsmeyer's wife, Melba. Plaintiff alleged that Melba admitted her liability under the contract during her testimony in the earlier case. Melba argued that the plaintiff had improperly split his cause of action and the trial court agreed, granting Melba's motion to dismiss. In reversing the dismissal, the Missouri Court of Appeals, Eastern District, noted the well-accepted principle that "[j]oint obligors to a contract may be sued separately, since contracts are construed as joint and several." Irwin, at 303 citing Elmer v. Copeland, 141 S.W.2d 160, 163 (Mo. App. E.D. 1940).

The case at bar is indistinguishable. The damages claimed by Romeos as resulting from the current defendants are identical to the damages the Romeos claimed Mr. DeRouin caused. Mr. DeRouin, Defendant Farkas, Defendant Robert E Jones, and the other defendants are jointly and severally liable. The Romeos are free to sue each defendant severally.

(3) The Doctrine Prohibits A Subsequent Action Against The Same Defendant However The Present Action Does Not Involve The Same Defendants As The Underlying Action.

Finally, Defendants' claim of improper splitting must fail for the simple reason that it only applies where the parties are the same. Shores v. Express Lending Services, Inc., 998 S.W.2d 122, 128 (Mo. App. E.D. 1999); Kayes v. Kayes, 897 S.W.2d 51 (Mo. App. E.D. 1995); Irwin v. Bertelsmeyer, 730 S.W.2d 302 (Mo.App. E.D. 1987); Jones v. Aetna Casualty & Surety Company, 497 S.W.2d 809 (Mo. App. 1973); Lee v. Guettler, 391 S.W.2d 311 (Mo. 1965). Here, we have different defendants and, accordingly, the defense of splitting a cause of action does not apply. Defendants contended that they, "as a matter of law" are the same defendants as DeRouin Homes and Ronald J. DeRouin. However, Defendants failed to cite to any authority which even remotely supports this contention. Additionally, the holding in Arana v. Koerner, 735 S.W.2d 729 (Mo.

App. 1987) contradicts the Defendants' contention. As discussed supra, Arana was a claim against both his insurer-appointed attorneys and his insurer. If the Defendants are correct, then the settlement in Arana between the doctor and his insurer would have barred his subsequent action against the attorneys. This was not the case, as the court specifically held that plaintiff had not split his cause of action.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

B. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT:

(1) RES JUDICATA BARS AN ACTION PREVIOUSLY ADJUDICATED ON THE MERITS AND HERE THERE HAD BEEN NO ADJUDICATION ON THE MERITS OF PLAINTIFFS' CLAIMS SET FORTH IN THE *ROMEO V. JONES, ET AL.* PETITION;

In Missouri, the doctrine of res judicata operates as a bar to the reassertion of a cause of action which has previously been ***adjudicated*** in a court proceeding.

"For the doctrine of res judicata to apply, a final judgment on the ***merits*** must have been rendered in the underlying action." Jordan v. Kansas City, 929 S.W.2d 882, 885 (Mo.App. 1996) citing Barkley v. Carter County State Bank, 791 S.W.2d 906, 910 (Mo.App.1990) (emphasis added). There was no such adjudication on the merits in the *Romeo v. DeRouin* action.

(a) An action dismissed without prejudice for failure to prosecute is not an adjudication on the merits for purposes of res judicata.

It is axiomatic that an action which has been dismissed *without prejudice* for failure to prosecute is not an adjudication on the merits and does not act as a bar to a subsequent action. Valley Farm Dairy Co. v. Horstmeier, 420 S.W.2d 314 (Mo. 1967). In *Romeo v. DeRouin*, the court, on its "own motion" "dismissed *without prejudice*" the action "for failure to prosecute . . . ." L.F. 222. Since *Romeo v. DeRouin* was not adjudicated on the merits, res judicata cannot apply to bar Romeos' action against Jones, et al.

(b) The settlement and release between Romeos and DeRouin does not act as an adjudication on the merits in that the Romeos expressly reserved their

cause of action against Jones, et al.

A settlement does not act as a bar to subsequent causes of action if that settlement specifically reserves those causes of action. In Larken, Inc. v. Wray,et al., 189 F.2d 729 (8th Cir. 1999), the parties had pending multiple counts in the form of both a claim and counterclaim. The trial court granted partial summary judgment as to some of the claims. However, "[j]ust as a jury was about to hear evidence concerning the other matter still at issue, the parties reached an oral settlement." Id. at 731. In its settlement, the parties specifically reserved those causes of action 1) not previously determined by the court and 2) not part of the settlement agreement. Id. Thereafter, Larken brought suit action Wray and Yip. The defendants raised the defense of res judicata and argued that the "earlier suit" "resolved the claim that Larken now presses." Id. at 732.

"When the parties to a previous lawsuit agree to dismiss a claim with prejudice, such a dismissal constitutes a 'final judgment on the merits' for purposes of *res judicata*.'" Id. "Nevertheless, the question of whether the parties actually agreed to dismiss a ***particular claim*** depends upon the proper interpretation of their settlement agreement—a legal inquiry governed by the ***parties' intent*** at the time of settlement." Id. (emphasis added). The Larken court first noted that the settlement agreement failed to disclose any evidence that the parties intended "to

foreclose" Larken's present claim. Id. at 733. It next reviewed "the circumstances surrounding the settlement in order to ascertain the parties' intent." Id. The court concluded that Larken's present claim "was not before" the first court and "therefore was not resolved by the parties' settlement." Id.

The case at bar is remarkably similar to that of Larken. Here, the parties in the *Romeo v. DeRouin* case entered into a settlement agreement. In that agreement, the parties specifically reserved Romeos' claims against "Robert E. Jones; the law firm of Jones, Korum & Jones; Alan L. Farkas; the law firm of Jones, Korum, Waltrip & Jones; and any persons being partners in such firms." L.F. 220. Since Romeos' claims against Jones, et al. were not before the *Romeo v. DeRouin* court and since the Romeos specifically reserved their causes of action against Jones, et al., the settlement between Romeos and DeRouin does not act as an adjudication on the merits. Accordingly, the *Romeo v. DeRouin* settlement is not res judicata as to this case.

(c) There is no adjudication on the merits for purposes of res judicata where the parties agree that the settlement can be set aside.

"While the rule is that a cause of action, when prosecuted to a judgment, becomes merged in the judgment, and such judgment is a bar to the prosecution of

another for the same cause of action, it is, nevertheless, competent for the parties (as the replication in this case avers they did), to agree that such judgment may be set aside and enjoined on the condition that it shall not affect the right of plaintiff in such judgment to prosecute his suit on his original cause of action, which formed the basis of such judgments." Wilson v. St. Louis, I.M. & S. Ry. Co., 1885 WL 7985, *2, 87 Mo. 431, *2 (Mo. 1885). Here, Romeos and DeRouin specifically agreed that the "release shall be null and void" if DeRouin failed to satisfy certain conditions. L.F. 220. Accordingly, the *Romeo v. DeRouin* dismissal lacked any "res judicata" finality.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

B. THE DOCTRINE OF RES JUDICATA DOES NOT APPLY TO BAR PLAINTIFFS' CLAIMS, IN THAT:

(2) RES JUDICATA BARS AN ACTION WHERE THAT ACTION INVOLVES THE SAME THING SUED FOR, THE SAME CAUSE OF ACTION, THE SAME PARTIES AND THE SAME QUALITIES OF PERSONS BUT HERE THE PARTIES IN *ROMEO V. JONES, ET AL.* ARE NOT THE

SAME PARTIES OR IN PRIVITY THERETO WITH THOSE IN *ROMEO V. DEROUIN*; THE THING SUED FOR DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*; AND THE CAUSE OF ACTION DIFFERS BETWEEN *ROMEO V. JONES, ET AL.* AND *ROMEO V. DEROUIN*.

"In order for estoppel by a former judgment (res judicata) to apply, there must be four identities: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made." WEA Crestwood Plaza, L.L.C. v. Flamers Charburgers, Inc., 24 S.W.3d 1, *9 (Mo.App. E.D.,2000). At least three of the four required "identities" are missing in the present case.

(a) The Third Identity: The present defendants are not in privity with the defendants from the prior adjudication.

Obviously the present defendants were not the same defendants in *Romeo v. DeRouin.* L.F. 204. Accordingly, the present defendants can satisfy this element only if they establish they were in privity, for res judicata purposes, with the *Romeo*

v. DeRouin defendants. "Privity, as a basis for satisfying the 'same party' requirement of res judicata, is premised on the proposition that ***the interests of the party and non-party are so closely intertwined*** that the non-party can fairly be considered to have had his or her day in court. Stine v. Warford, 18 S.W.3d 601, 605 (Mo.App. W.D. 2000) (emphasis added). While the interest of Jones, et al. in disproving Romeos' allegations may be the same as DeRouin's interest, this is insufficient. "Privity is not established simply because the parties are interested in the same question or in proving or disproving the same state of facts." Steinhoff v. Churchill Truck Lines, Inc., 875 S.W.2d 175, 177 (Mo.App. E.D. 1994).

The courts in this state have found exceptionally-close relationships lacking the requisite privity. The Western District of the Missouri Court of Appeals found that spouses do not satisfy the privity requirement for purposes of res judicata. In Burke v. L & J Food and Liquor, Inc., 945 S.W.2d 662 (Mo.App. W.D., 1997) the issue was whether a general release given on behalf of the injured husband extinguished the wife's loss of consortium claim.[1] The fact the wife was the

[1] The release discharged the defendants from "*any and all claims . . . which may hereafter arise out of an accident, . . .* forming the basis of the case filed in the Circuit Court of Jackson County, Missouri styled *Frederick J. Burke v. L & J Food and Liquor, Inc., Larry Marshall and Joseph Giamalva*, Case No. CV94-012199*, as well as any and all claims made which could have been made in the*

spouse did not establish privity. Therefore, her subsequent action for loss of consortium was not barred by res judicata.

In Stine v. Warford, 18 S.W.3d 601 (Mo.App. W.D. 2000), the court found that a father-in-law was not in privity with his daughter-in-law for purposes of res judicata. There, Warford had been involved in a motor vehicle accident with Stine's daughter-in-law, who had been driving Stine's car at the time of the accident. Warford successfully sued the daughter-in-law for Warford's damages arising out of the automobile collision. Thereafter, Stine sued Warford for the damage to his car. Warford argued that Stine's action was barred by res judicata due to her prior successful action against Stine's daughter-in-law. Although Stine was not a party to Warford's action against the daughter-in-law, Warford argued that Stine was in privity in that he was the owner of the car **and** the father-in-law. The court of appeals rejected this contention, finding no privity for purposes of res judicata.

In Cox v. Steck, 992 S.W.2d 221 (Mo.App. E.D. 1999), the Eastern District for the Missouri Court of Appeals held that an insured and an insurer were not in privity. There, Cox brought an action against Steck, whom State Farm insured, for injuries received during an altercation in a bar. State Farm denied coverage.

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aforementioned lawsuit." Id. at 663 (emphasis in original).

Thereafter, Cox and Steck entered into a settlement agreement pursuant to §537.065 R.S.Mo. 1994 wherein Cox agreed to execute only upon Steck's State Farm policy. During the garnishment proceeding, Cox attempted to assert res judicata against State Farm in response to their denial of coverage claim. Since State Farm was not a party in the underlying action, one of the issues before the court was whether the interests of State Farm and Steck were so closely related to satisfy the privity element. In holding that the interests were not close enough, the court noted the apparent and actual conflict between the two. The court recognized that coverage under the terms of State Farm's policy turned on whether the actions of Steck were intentional or unintentional. Steck, the insured, had an interest in saying his actions were unintentional thereby providing him with full coverage. On the other hand, State Farm had an interest in saying Steck's actions were intentional, obviously resulting in denial of coverage. Based upon this conflict of interest, the court found no privity.

A similar conflict of interest also existed between the present defendants, Jones, et al., and the *Romeo v. DeRouin* defendants. In *Romeo v. DeRouin*, the defendants Ronald J. DeRouin and DeRouin Homes raised the affirmative defense of reliance upon counsel. L.F. 251-266. Essentially, DeRouin took the position that he was not at fault in bringing the *DeRouin v. Romeo* action—but that his attorneys (i.e. Jones, et al.) were. Conversely, Jones, et al. took the position that

they based their opinion as to the merits of the *DeRouin v. Romeo* action upon the statements provided to them by DeRouin, essentially trying to absolve themselves of any responsibility. L.F. 158-160. The presence of this virtual finger-pointing results in a conflict thereby preventing a finding of "closely related . . . interests."

(b) The First Identity: The subject matter of *Romeo v. Jones, et al.* differs from that of *Romeo v. DeRouin*.

The first of the four "identities" in res judicata, identity of the thing sued for, is absent in the case at bar. This Court has alternatively referred to this identity as "subject matter of the suit." Ollison v. Village of Climax Springs, 916 S.W.2d 198, 201 (Mo.banc 1996). Courts in this state have grappled with applying this first identity. One appellate court has even gone so far as to conclude that the trend is to combine the first and second identities. Barkley v. Carter County State Bank, 791 S.W.2d 906, 910 fn.4 (Mo.App. S.D. 1990).

The "subject matter" of *Romeo v. DeRouin* was the liability of **DeRouin** and his solely owned corporation for bringing and prosecuting *DeRouin Homes v. Romeo*. The "subject matter" of *Romeo v. Jones, et al.* is the liability of **Jones** and **Farkas** for **their own** individual, wrongful, malicious actions in prosecuting *DeRouin Homes v. Romeo*. The liability of Jones and Farkas is not premised on dependent upon the liability of DeRouin. *Romeo v. Jones, et al.* is not a case of

vicarious liability.

(c) The Second Identity: The issues in *Romeo v. Jones, et al.* differ from those of *Romeo v. DeRouin*.

The second of the four "identities" in res judicata, identity of the cause of action, likewise is missing. The causes of action in *Romeo v. DeRouin* was malicious prosecution and abuse of process against DeRouin for his own personal actions. The cause of action in *Romeo v. Jones, et al.* is for abuse of process for the actions of Jones, et al. While Romeos did sue Jones et al. For abusing process for the improper purpose of allowing DeRouin to sell homes without disclosure of the Romeos' complaints, Romeos also specifically pled, in the present case, that Jones, et al. also abused process by using discovery to obtain improper information. L.F. 13. Additionally, Romeos pled that Jones, et al. abused process by continuing with the *DeRouin v. Romeo* lawsuit for the sole purpose of preventing the Romeos from prosecuting an anticipated action for malicious prosecution. L.F. 13. Romeos did not charge DeRouin with similar wrongs. L.F. 204-219.

Since the parties in the *Romeo v. DeRouin* case resolved the matter by way of a settlement, no issues were even adjudicated there. In Ste. Genevieve County v. Fox, 688 S.W.2d 392 (Mo.App. E.D. 1985), the court noted that due to the parties' settling their differences, "there was no stipulation as to liability or any

other fact which might have been determined had there been a trial." Id. at 395, fn 2. "Since no issues were actually determined, clearly collateral estoppel" was not applicable. Id. While the issue there was collateral estoppel, the same reasoning applies here.

(d) Public policy considerations are absent in the case at bar.

The application of res judicata promotes three general purposes. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, (U.S. 1980). "The policies supporting *res judicata* include: (1) relieving parties of the cost and vexation of multiple lawsuits; (2) conserving judicial resources; and (3) encouraging reliance on adjudications." Jordan v. Kansas City, 929 S.W.2d 882, *885 (Mo.App. W.D. 1996) citing Doherty v. McMillen, 805 S.W.2d 361, 362 (Mo.App. E.D. 1991). Jones, et al. were not parties in the *Romeo v. DeRouin* action and, therefore, defendants are not incurring additional cost due to multiple lawsuits. Secondly, conservation of judicial resources is of no concern here since *Romeo v. DeRouin* was never tried. Finally, there was no adjudication in *Romeo v. DeRouin* upon which any reliance could be placed. The policy considerations behind the application of res judicata are not present.

The facts in the case at bar is not unlike those presented in Clayton Plaza

International Leasing Company, Inc. v. Sommer, 817 S.W.2d 933 (Mo.App. E.D. 1991) and Arana v. Koerner, 735 S.W.2d 729 (Mo. App. 1987). In Clayton Plaza, Clayton Plaza ("Plaza") had purchased the stock of Vulcan Manufacturing Company from George Hilleman, Vulcan's sole shareholder. Subsequently, Plaza pursued a claim against Hilleman for misrepresentation. Specifically, Plaza alleged misrepresentations relating to financial statements. Id. at 934. Hilleman and Plaza eventually settled with both parties entering into a "'full and complete mutual release and settlement agreement.'" Id. The release "discharged . . . George Hilleman, his hears, successors and assigns from any and all manner of action and actions . . . ." Id. at 935. Furthermore, the release stated that it was "binding upon and shall inure to the benefit of the . . . officers, directors, employees, *agents* and *representatives* of the corporate entities released hereunder." Id. (emphasis added).

Shortly thereafter, Plaza filed the present action against Sommer. In that petition, Plaza alleged that Vulcan employed Sommer as a certified public accountant. Id. Plaza's action against Sommer also revolved around the financial statements. Specifically, it alleged that Sommer had prepared the financial statements but that they did not accurately depict the financial conditions of Vulcan. Most notably, "the inaccuracies alleged to be contained in the financial statements in the [action against Sommer] were identical to those alleged" in Plaza's action against Hilleman. Id. However, the action against Sommer sounded in

negligence in preparing the financial statements instead of misrepresentation. The trial court granted Sommer's motion for summary judgment, specifically finding that Sommer "'was an agent of George Hilleman and thus released under the full and complete mutual release and settlement agreement.'" Id.

On appeal, Sommer argued that the release and subsequent dismissal in the action against Hilleman barred the action against him on the grounds of res judicata. Specifically, Sommer argued that "a judgment on the merits in favor of a principal bars further action against the agent." Id. at 936. However, the Eastern District noted that "to apply this standard with regard to release agreements would have the effect of stripping RSMo §537.060 (1986) of much of its purpose of preserving claims where partial releases are made." Id. The court held that res judicata did not bar Plaza's subsequent action against Sommer.

In Arana v. Koerner, a doctor had been a defendant in a medical malpractice action. His insurance company retained counsel to represent him. He forbade his attorneys and insurer from settling the claim as he believed it to be without merit. His instructions were not followed. Thereafter, the doctor filed two separate actions: one against the insurer-paid attorneys and one against the insurer. In both actions, the doctor's "allegations as to the items and amount of damages were the same." Id. at 732. Doctor thereafter settled with the insurer and proceeded with his action against the attorneys. The attorneys argued that the doctor had

improperly split his cause of action. Specifically, they argued that the insurer should have been made a party to the action against the attorneys and that the doctor "split his cause of action so that he could have two chances at recovery." Id. at 734. The court held that since the damages were the same, the defendants were jointly and severally liable. Accordingly, the doctor properly sued them separately and he did not improperly split his cause of action. Id.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE:

C. PLAINTIFFS' FACTS AND PLEADINGS SUPPORT A CAUSE OF ACTION FOR ABUSE OF PROCESS, IN THAT PLAINTIFFS ARE NOT PRECLUDED FROM PURSUING THEIR CLAIMS FOR ABUSE OF PROCESS BECAUSE THERE ARE FACTS WHICH ALSO SUPPORT A CAUSE OF ACTION FOR MALICIOUS PROSECUTION.

In their Amended Motion, the Defendants correctly stated that instituting an action without probable cause may give rise to a claim for malicious prosecution. However, Defendants were mistaken in their argument that the existence of facts constituting a cause of action for malicious prosecution negates the existence of a

cause of action for abuse of process. The same facts may give rise to a cause of action for malicious prosecution and a cause of action for abuse of process. In Stafford v. Muster, 582 S.W.2d 670 (Mo. 1979) the plaintiff was permitted to proceed with her claims of malicious prosecution and abuse of process stemming from a single set of occurrences. Should the plaintiff adduce sufficient proof of liability at trial, the court held she may recover but once for the injuries she has sustained. Id.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE DEFENDANTS, AS ATTORNEYS FOR R.J. DEROUIN HOMES, INC. IN *R.J. DEROUIN HOMES, INC. V. ROMEO*, THE UNDERLYING ACTION, ARE LIABLE FOR ABUSE OF PROCESS IN THAT, AN ATTORNEY MAY BE LIABLE TO A THIRD PERSON FOR ACTS ARISING OUT OF ATTORNEY'S REPRESENTATION OF A CLIENT IF THE ATTORNEY IS GUILTY OF A MALICIOUS OR TORTIOUS ACT AND HERE THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE ACTS OF THE DEFENDANTS WERE (1) INTENTIONAL TORTIOUS ACTS; (2) MALICIOUS ACTS; AND (3) ACTS COMMITTED IN COLLUSION WITH THEIR CLIENTS FOR WHICH DEFENDANTS ARE LIABLE

FOR ABUSE OF PROCESS.

On appeal of a summary judgment, this Court reviews the record in the light most favorable to the party against whom judgment was entered. Thomas Berkeley Consulting Engineer, Inc. v. Zerman, 911 S.W.2d 692, 695 (Mo.App. E.D. 1995). The standard of review on this point is de novo. Id.

In their Amended Motion, the Defendants professed that they are liable for abuse of process only if Romeos establish that Defendants were guilty of "fraud, collusion, or a malicious and tortious act." L.F. 34. Defendants contended that the record is "bereft of evidence" that they were guilty of fraud, collusion, malice, abuse of process or any intentional tort. L.F. 34-35. Defendants were correct in their interpretation of Missouri law as to when an attorney is liable to third parties for acts arising out of their representation. Defendants are incorrect in their representation that the Romeos have failed to adduce any evidence of Defendants' wrongful acts.

Clearly Missouri recognizes the liability of an attorney for the intentional tort of abuse of process. In Stafford v. Muster, 582 S.W.2d 670 (Mo. 1979) this Court held that the attorney involved in the issuance of a writ of habeas corpus could be held liable for abuse of process if the elements were established. Id. at 679. There, the petition alleged the defendants used the writ to interrogate the plaintiff as to

matters that were beyond the scope of proper inquiry under Missouri Rule 91.16. Id. Questions concerning the address of the plaintiff's parents and the plaintiff's former telephone number were beyond the scope of proper inquiry. Id. Here, Defendants Farkas and Robert E. Jones admittedly used process for a similar purpose. On at least one occasion they propounded interrogatories, as plaintiffs, to obtain information from the Romeos to use as a possible defense for a subsequent action, if filed, by the Romeos against another DeRouin controlled company. L.F. 297. Defendant Farkas specifically stated in his letter to Mr. DeRouin dated February 23, 1995, "[t]he bulk of discovery is directed at establishing a defense for you should the Romeos follow up on their threats to file suit based on the alleged construction defects." L.F. 297.

In addition to the above, there is ample evidence from which a jury could find the defendants abused process to quiet the Romeos in order to further the sales of their client. During Defendant Farkas' telephone call with Richard Romeo he told Mr. Romeo the purpose of the injunction was to shut them up. L.F. 641. On August 18, 1995, Defendant Farkas wrote a letter to Mr. DeRouin stating his strategy will be to delay the depositions of DeRouin's sales agents, in accordance with Mr. DeRouin's direction. L.F. 299. Defendant Farkas' August 16, 1995 letter to Mr. DeRouin states that if his sales are complete, Mr. DeRouin may want to dismiss the lawsuit. L.F. 298. Defendant Farkas discusses prolonging the case in

order to allow time for Dell Jones and Associates, Inc. to dissolve in his September 20, 1995 letter. L.F. 300-02. In that same letter he discusses filing the answer to *Romeo v. Dell Jones* for the purpose of delaying any action by the plaintiffs. L.F. 300-02. Defendant Farkas' letter dated October 10, 1995 states that he "orchestrated" a delay in discovery for the purpose of allowing DeRouin to complete his sales efforts. L.F. 303-04. In Defendant Robert E. Jones' letter dated March 20, 1996 he advises Mr. DeRouin to continue to insist that the Romeos pay court costs for the purpose of insuring against a future claim for malicious prosecution. L.F. 306.

Defendants Farkas and Robert E. Jones tried to shut the Romeos up by filing the injunction. When the injunction was dismissed they amended the pleadings alleging liable and slander in the hope that the lawsuit as amended would have the same effect as the injunction. They used the lawsuit to quiet the Romeos so their client could continue selling the homes he was building. Jones, et al. used the lawsuit to propound interrogatories to prepare a defense in case the Romeos filed suit against Dell Jones and Associates, Inc. It seems absurd that the same parties who claim there is no relationship between Dell Jones and Associates, Inc. and R.J. DeRouin Homes, Inc. would use a lawsuit filed on behalf of R.J. DeRouin Homes, Inc. to gather information to defend against a possible lawsuit against a company they claim has no relationship with their client. After dismissing the lawsuit they

reinstated it for the purpose of causing the Romeos to pay court costs so as to preclude the Romeos from filing a subsequent malicious prosecution action against their client.

Defendants Farkas and Robert E. Jones used the legal process for perverted purposes for which it was never intended. They used it to silence the Romeos from their constitutionally protected right of free speech in order to further the sales of their client and to prepare a defense for an action against another corporation that had not yet been filed.

CONCLUSION

Plaintiffs pled and proved facts supporting their causes of action for abuse of process. There are genuine issues of material fact as to the wrongful purposes of defendants in filing and prosecuting the actions against the Romeos for injunctive relief and damages for defamation. All of the case law and secondary authority that have discussed the issue have held that these facts and pleadings give the plaintiffs a cause of action. They are entitled to submit their causes of action to a jury. The summary judgment of the trial court should be reversed and the matter remanded for trial.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Come now Appellants, by and through their attorneys, and in accordance with Missouri Supreme Court Rule 84.06(c), the undersigned hereby certifies that Appellants' Brief was prepared using WordPerfect 8.0, and that this brief complies with the limitations contained in Rule 84.06(b) in that this brief contains 15,961 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Statement, Brief and Argument of Appellants, pursuant to Rule 84.05(a), along with one computer disk, pursuant to Rule 84.06(g), containing the Statement, Brief and Argument of Appellants, were hand-delivered to Thomas J. Hayek, attorney for Respondents, 7777 Bonhomme Ave., Ste. 1810, St. Louis, MO 63105 this 11th day of July, 2002.

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